

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

STEVEN M. NEIL, )  
Plaintiff, ) No. CV-08-5031-JPH  
v. )  
MICHAEL J. ASTRUE, Commissioner ) ORDER GRANTING PLAINTIFF'S  
of Social Security, ) MOTION FOR SUMMARY JUDGMENT  
Defendant. ) AND REMANDING FOR FURTHER  
 ) ADMINISTRATIVE PROCEEDINGS  
 ) (Ct. Rec. 15)  
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BEFORE THE COURT is plaintiff's motion for summary judgment (Ct. Rec. 15) and defendant's motion for remand (Ct. Rec. 22) noted for hearing without oral argument on March 27, 2009. Attorney Thomas Bothwell represents plaintiff; Special Assistant United States Attorney Stephanie R. Martz represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **grants** Plaintiff's Motion for Summary Judgment (Ct. Rec. 15) and orders a remand for further administrative proceedings. The court **denies** Defendant's Motion for Remand (Ct. Rec. 22) as moot.

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## **STANDARD OF REVIEW**

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

26 It is the role of the trier of fact, not this Court, to  
27 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If

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1 evidence supports more than one rational interpretation, the Court  
2 may not substitute its judgment for that of the Commissioner.  
3 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
4 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
5 substantial evidence will still be set aside if the proper legal  
6 standards were not applied in weighing the evidence and making the  
7 decision. *Brawner v. Secretary of Health and Human Services*, 839  
8 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
9 evidence to support the administrative findings, or if there is  
10 conflicting evidence that will support a finding of either  
11 disability or nondisability, the finding of the Commissioner is  
12 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
13 1987).

14 **ISSUE**

15 The parties agree that the ALJ erred and the case should be  
16 remanded for further administrative proceedings. (Ct. Rec. 17, 22,  
17 23, and 24.) The Commissioner concedes the ALJ's RFC  
18 determination and hypothetical question to the VE were not  
19 complete. (Ct. Rec. 23 at 2.) The Commissioner argues certain of  
20 the ALJ's conclusions in the prior determination are correct and  
21 should not require reevaluation on remand. The Commissioner cites  
22 no authority for this argument. The Commissioner goes on to state  
23 that, on remand, plaintiff may submit additional evidence and may  
24 raise and pursue other issues, including any disclosed in  
25 plaintiff's brief. (Ct. Rec. 23 at 7.)

26 On remand the ALJ will redetermine plaintiff's RFC, which of  
27 necessity will include considering the evidence the ALJ deems  
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1 appropriate to making the determination.

2 On remand the ALJ may wish to utilize the services of a  
3 medical expert, a vocational expert, or both. At step four, if  
4 necessary, the ALJ will consider whether plaintiff can perform any  
5 past relevant work. If necessary, the ALJ will proceed to step  
6 five.

7 The court expresses no opinion as to what the ultimate  
8 outcome on remand will or should be. The fact-finder is free to  
9 give whatever weight to the additional evidence is deemed  
10 appropriate. See *Sample v. Schweiker*, 694 F. 2d 639, 642 (9<sup>th</sup>  
11 Cir. 1982) ("Q)uestions of credibility and resolution of conflicts  
12 in the testimony are functions solely of the Secretary.")

13 **CONCLUSION**

14 Having reviewed the record and the briefing by the parties,  
15 this court agrees that the ALJ's decision is not free of legal  
16 error and must be reversed and remanded for further proceedings.  
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18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is  
20 **GRANTED**. The case is remanded for further administrative  
21 proceedings.

22 2. Defendant's Motion for Remand (**Ct. Rec. 22**) is **DENIED as**  
23 **moot**.

24 The District Court Executive is directed to file this Order,  
25 provide copies to counsel for Plaintiff and Defendant, enter  
26 judgment in favor of Plaintiff, and **CLOSE** this file.

27 DATED this 30<sup>th</sup> day of March, 2009.

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1                   s/ James P. Hutton

2                   JAMES P. HUTTON  
3                   UNITED STATES MAGISTRATE JUDGE

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